

Sixth Circuit: Telling Supervisor to stop Harassing Conduct is Protected Activity Under Title VI

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A company cannot fire an employee in retaliation for complaining to supervisors about sexual harassment, the Sixth Circuit recently held in *Equal Employment Opportunity Commission v. New Breed Logistics*, No. 13-6250 (6th Cir. April 22, 2015). This seems pretty straightforward, right? Not entirely. In this case, the employer argued that an employee who tells a supervisor to stop harassing her is not engaging in “protected activity” because she is not officially opposing an unlawful employment practice. Without the protected activity, there can be no retaliation, the employer argued. As discussed more fully below, and probably not as a surprise to many, this argument did not fly with the Court.

The case involved personnel at the Memphis, Tennessee warehouse of *New Breed Logistics* (*New Breed*), a supply-chain logistics company. In their complaint, three female former employees alleged that a male supervisor made sexually explicit comments to them during their employment. All three employees allegedly complained to the supervisor about his conduct; and all three were fired soon afterwards. The evidence at trial showed that the supervisor had a role in the firings. *New Breed* maintained that the employees were fired because of poor work performance and issues relating to tardiness.

A jury sided with the employees, awarding all claimants a total of \$1.5 million in compensatory relief and punitive damages. *New Breed* appealed the ruling to the Sixth Circuit.

On appeal, *New Breed* argued that the conduct at issue, even if true, did not fall within the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, which protects individuals against employment discrimination. Among its protections, Title VII prohibits an employer from retaliating against an employee who has either (1) opposed an unlawful employment practice or (2) “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing” under the law. These protections are commonly referred to as the “opposition” and “participation” clauses, respectively.

New Breed took the position that mere complaints to a supervisor do not rise to the level of “protected activity” that would trigger the opposition or participation clauses. The Sixth Circuit disagreed.

Affirming the district court decision, the court cited both Sixth Circuit and U.S. Supreme Court precedent establishing a broad definition of “protected activity” under Title VII. The court stated that **New Breed had not provided a persuasive rationale for limiting the law’s anti-retaliation provisions:**

If an employee demands that his/her supervisor stop engaging in this unlawful practice – i.e., resists or confronts the supervisor’s unlawful harassment – the opposition clause’s broad language confers protection to this conduct. Importantly, the language of the opposition clause does not specify to whom protected activity must be directed.

Although the Sixth Circuit’s ruling in *New Breed* appears to reflect the majority approach, it is not the unanimous law of the land. The Fifth Circuit, for example, has held that communications directed solely to supervisor do not constitute protected activity. In order to manage risk and potentially avoid future litigation, employers should always take caution when taking adverse employment action against an employee who has recently made a complaint - whether officially or unofficially. With questions, please contact **Peter Felsenfeld** of Hinshaw’s San Francisco office.

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